TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 10

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY, PETITIONER,

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

PETITION FOR CERTIORARI FILED FEBRUARY 25, 1939.

CERTIORARI GRANTED APRIL 17, 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 702

M. LUTHER PITTMAN, CLERK OF THE SUPERIOR COURT OF BALTIMORE CITY, PETITIONER,

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

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[fol. 4] **IN THE BALTIMORE CITY COURT**

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C., a Corporate Instrumentality of the United States of America,

vs.

M. LUTHER PITTMAN, Clerk of the Superior Court of Baltimore City

PETITION FOR WRIT OF MANDAMUS—Filed March 12, 1938

To the Honorable, the Judge of said Court:

The petition of Home Owners' Loan Corporation, of Washington, D. C., a corporate instrumentality of the United States of America, for a writ of mandamus, respectfully represents:

1. That the Petitioner is a corporate instrumentality of the United States of America, organized, existing and operating pursuant to Section 4 of Public Act No. 43, 73d Congress, approved June 13, 1933, known as the Home Owners' Loan Act, as amended (12 U. S. C. A. Chapter 12, Section 1461 to 1463a inclusive) whose entire capital stock is owned by the United States, and as such has been operating in the several states, and in the State of Maryland; and

2. That in the due course of your Petitioner's operations, a certain Martin J. Burns and Mary Burns, his wife, of Baltimore, Maryland, conveyed unto your Petitioner, by way of the execution and delivery of a mortgage dated the 11th day of March, 1938, (a copy of which is filed herewith, marked "Petitioner's Exhibit No. 1" and prayed to be taken as a part hereof) a leasehold estate and term of 99 years from June 10, 1893, renewable from time to time forever and subject to the payment of an annual ground [fol. 5] rent of Forty-Two Dollars and Twenty-Five Cent ($42.25) in and to the dwelling property in Baltimore City, known as No. 435 East 27th Street and particularly described as follows:

"Beginning for the same on the south side of 27th Street (formerly Oxford Street) at the distance of one hundred

thirty-four feet west of the York Road and running thence westerly on the south side of 27th street thirteen feet then southerly parallel with the York Road ninety feet to the north side of an alley ten feet wide thence easterly along said alley with the use thereof in common thirteen feet and thence northerly in a straight line ninety feet to the place of beginning."

to secure the repayment of an advance by your Petitioner to said mortgagors of One Hundred and Eleven ($111.00) Dollars, said advance having been made for the sole purpose of defraying the costs of certain repairs and reconditioning to said property which were necessary to preserve the said property as security for an original loan made to said mortgagors by your Petitioner on July 11, 1934; and

3. That to preserve and to protect its lien and to enjoy the full benefits of the mortgage, it is a legal necessity under the laws of Maryland that said mortgage be recorded among the land records of the City of Baltimore as required and directed by the statutes of said state in such cases made and provided; and

4. That M. Luther Pittman is the duly qualified Clerk of the Superior Court of Baltimore City, and under the provisions of Article 4, Section 38 of the Constitution of Maryland, he, as such Clerk of the Superior Court, is entrusted with the land records of said City of Baltimore, and it is his duty to receive and record all deeds, mortgages, conveyances and other papers entitled or required by law to be recorded in said land records of said City; and

5. That on the 12th day of March, 1938, your Petitioner appeared, through its agent and employee, at the office of the Clerk of Superior Court in the City of Baltimore during the hours when said office was open for the transaction [fol 6] of business, the said date being a business day and not a Sunday or holiday, and then and there tendered to the said M. Luther Pittman, Clerk as aforesaid, the aforementioned mortgage duly executed and acknowledged, and in all respects ready and eligible for recording under the registration laws of said State of Maryland, together with a fee of Two Dollars and Fifty Cents ($2.50), the lawful charge for recording said instrument as stated by the said M. Luther Pittman, Clerk as aforesaid, and did then and there request and demand that said mortgage be received

and recorded among the land records of the City of Baltimore as by law provided in such cases; and

6. That the said M. Luther Pittman, Clerk as aforesaid, upon tender of said mortgage for recordation and the usual fee exacted therefor as fixed by law, did then and there refuse to receive the same for recordation, and refused to record the same unless and until your Petitioner paid to him for the use of the State of Maryland, in addition to the aforesaid usual fee for recording, a recording tax of Fifty Cents (50c), and also unless and until State of Maryland documentary stamps amounting to Twenty Cents (20c) in cost were purchased, affixed to said mortgage, and cancelled; and

7. That the stamp and recording tax damanded of your Petitioner by said M. Luther Pittman, Clerk as aforesaid, is an excise tax arising under the provisions of Chapter 11 of the Acts of the Special Session of the General Assembly of Maryland for 1937, imposed upon deeds, mortgages (except purchase-money mortgages), bills of sale, contracts of sale, and other instruments; and is in nowise a service charge for the labor, time and material expended and incident to recording; and

8. That your Petitioner, both by reason of the provisions of Section 4 (c) of the Home Owners' Loan Act of 1933 as amended (48 Stat. 129), and the fact that it is an instrumentality of the United States, is immune and exempt from state taxation of any character upon its franchise; its bonds, notes, mortgages, deeds of conveyance, loans, capital, reserves or income; except that its real estate is taxable, as such, to the same extent as other real property is taxed [fol. 7] according to its value; and the attempted collection of said stamp and recording tax upon the mortgage herein described by said M. Luther Pittman, Clerk as aforesaid, is an unlawful interference with the lawful operations of your Petitioner, placing a burden, impediment, and obstruction upon its functions and thus operating to hinder, delay, and embarrass your Petitioner in the exercise of the duties imposed upon it by a law of the Congress of the United States and contravening Article VI, Clause 2 of the Constitution of the United States; and your Petitioner avers that the State of Maryland is not empowered to impose said tax on said mortgage, and that the said M. Luther

Pittman, Clerk as aforesaid, has no right to delay, hold up, or refuse to record said mortgage because of non-payment of said recording tax and the failure to purchase, affix, and cancel the documentary stamps as aforesaid, and that his refusal to record said mortgage will result in great injury to your Petitioner; and

9. That your Petitioner in its operations under the said Home Owners' Loan Act of 1933 and amendments thereto, in assisting the home owners in Maryland who were in involuntary default on mortgages and other liens held against their homes, which they were unable to refinance with private lending agencies, consummated 15,940 refinancing loans secured by first mortgages on dwelling properties and aggregating in amount the sum of $45,579,933.00, and since the closing of said refinancing loans it has become necessary to foreclose many of said mortgages by reason of insoluble defaults in the performance of the covenants contained therein, and that your Petitioner has acquired title to more than 2,000 separate and distinct properties, and as time advances it will of necessity, in the pursuit of its liquidating program, become the owner of other properties through foreclosure or otherwise, and eventually said acquired properties necessarily will be disposed of by deeds of conveyance to purchasers, which deeds, and other instruments in writing necessary to your Petitioner's future conveyancing operations, will be required to be recorded. All of which is related to the Court as an indication of the public nature and importance of the question here at issue; and

[fol. 8] 10. That this is an action of mandamus brought by your Petitioner against M. Luther Pittman, Clerk as aforesaid, to require him under orders of this Court to receive and record the mortgage herein referred to, upon payment of the usual and ordinary legal fee for said service; and your Petitioner avers that it otherwise has no clear, adequate, and speedy remedy in the ordinary course of law, and hence brings this action to obtain relief.

Wherefore, your Petitioner prays:

1. That a writ of mandamus be issued commanding and compelling M. Luther Pittman, Clerk of the Superior Court of Baltimore City, to receive forthwith the aforementioned mortgage and to record it among the Land Records of Balti-

more City upon the payment of the ordinary and usual recording fee therefor, without the payment of said recording tax or the affixation of said documentary stamps.

2. That judgment be entered in favor of your Petitioner that it recover of the defendant, M. Luther Pittman, Clerk as aforesaid, its costs.

John I. Rowe, Thomas E. Barrett, Jr., Risque W. Plummer, Attorneys for Petitioner. Herbert L. Grymes, State Manager.

Duly sworn to by Herbert L. Grymes. Jurat omitted in printing.

[fol. 9] ORDER TO SHOW CAUSE

Ordered this 12th day of March, 1938, by the Baltimore City Court upon the foregoing Petition, Affidavit and Exhibit, that a rule be and it is hereby laid on the said M. Luther Pittman, Clerk of the Superior Court of Baltimore City, requiring him to show cause on or before the 31st day of March, 1938, why the Writ of Mandamus should not be issued as prayed; provided a copy of this Order be served on the said M. Luther Pittman, Clerk as aforesaid, on or before the 18th day of March, 1938.

Edwin T. Dickerson.

PETITIONER'S EXHIBIT NO. 1, FILED WITH PETITION FOR WRIT OF MANDAMUS

HOLC Form R-60, Maryland

Approved 9-29-36

This Mortgage, made this 11th day of March, 1938, by and between Martin J. Burns and Mary Burns, his wife, of the City of Baltimore, State of Maryland, Mortgagors and Home Owners' Loan Corporation, Mortgagee.

Whereas, the Mortgagors are indebted unto the Mortgagee in the sum of One Hundred and Ten ($110.00) Dollars, with interest to accrue thereon at the rate of five per centum per annum, which sum with interest the Mortgagors hereby covenant to pay the Mortgagee at its office in Balti-

more, Maryland, at the expiration of one day after the date [fol. 10] hereof (said sum having been advanced to defray cost of necessary repairs to the hereinafter referred to property).

Whereas, said Mortgagors are desirous of securing the prompt payment of said mortgage debt, with interest as aforesaid, and the performance of the other covenants herein contained; these presents are executed.

Now Therefore This Mortgage Witnesseth, that for and in consideration of the premises and the sum of One Dollar ($1.00) and other valuable considerations, the Mortgagors do hereby grant and convey unto the said Mortgagee, its successors and assigns, all that lot of ground situate in the City of Baltimore, State of Maryland, and described as follows:

All that lot of ground and premises known as No. 435 East Twenty Seventh Street and more fully described in a mortgage from the Mortgagors herein to the Mortgagee herein dated July 11th, 1934, and recorded among the Land Records of Baltimore City in Liber S. C. L. No. 5460, folio 516, to which mortgage reference is hereby made for a more complete description.

Together with the buildings and improvements thereon and the rights, roads, ways, waters, privileges, appurtenances and advantages thereto belonging or in anywise appertaining.

To Have and to Hold the aforesaid parcel of ground and premises unto and to the proper use and benefit of the Home Owners' Loan Corporation, its successors and assigns, for the residue of the term unexpired therein, with the right of renewal forever, subject to an annual rent of $42.25.

Provided, That if the Mortgagors shall make the payments and perform the covenants herein on their part contained, then this mortgage shall be void.

The Mortgagors hereby covenant that a default under any prior Mortgage shall constitute a default hereunder and the full amount, together with interest due under this Mortgage shall become immediately due and payable.

[fol. 11] The Mortgagors do hereby declare their assent to the passing of a decree by the Circuit Court of Baltimore, or the Circuit Court No. 2 of Baltimore City, for a sale of the property hereby mortgaged, in accordance with Chapter 123, Sections 720 to 732, inclusive, of the Laws of Maryland

passed at the January session in the year 1898, or any amendment or additions thereto.

And, in case of any default in the payment of said mortgage debt or interest, when payable or in any covenant or condition of this mortgage, then the entire mortgage debt shall be due and it shall be lawful for the said Mortgagee, its successors or assigns, or Thomas E. Barrett, Jr., and Peter M. Siewierski, or either of them to sell the property hereby mortgaged or so much thereof as may be necessary, to satisfy said debt, interest and all costs incurred in making such sale (Under Article 66, Section 6 to 10 of the Maryland Code, Public General Laws, or any other General or Local Laws relating to Mortgages) and to grant the said property to the purchasers thereof, his, her, or their personal representatives or assigns.

And provided further that Mortgagors shall retain the exclusive right of possession of the said property, and all rights, benefits and liabilities concurrent therewith, until such time after a default in the aforementioned Mortgage between the parties hereto, dated July 11th, 1934, or in the above premises as said Mortgagee, in its discretion, shall demand possession thereof by an instrument in writing addressed to Mortgagors at 435 East Twenty Seventh Street, Baltimore, Maryland, and deposited in the United States Mail, registered and postage prepaid.

Wherever the context hereof requires the plural number as used herein shall include the singular.

Witness the hands and seals of the Mortgagors.

Martin J. Burns. (Seal.) Mary A. Burns. (Seal.)

Test: Edward C. Golder.

[fol. 12] STATE OF MARYLAND,
City of Baltimore, to wit:

I Hereby Certify, that on this 11th day of March, 1938, before me a Notary Public of the State of Maryland, in and for Baltimore City, personally appeared Martin J. Burns and Mary Burns, his wife, the Mortgagors named in the aforegoing Mortgage, and they acknowledged the aforegoing Mortgage to be their act. At the same time also appeared Thomas E. Barrett, Jr., agent of said Mortgagee, and made oath that the consideration set forth in said Mortgage is true and bona fide as therein set forth, and also

made oath that he is the agent of said Mortgagee authorized to make this affidavit.

Edward C. Golder, Notary Public. My commission expires the 1st day of May, 1939. (Seal.)

Rule Answer.

IN BALTIMORE CITY COURT

DEMURRER TO THE PETITION FOR WRIT OF MANDAMUS—Filed March 30, 1938

To the Honorable, the Judge of said Court:

M. Luther Pittman, Clerk of the Superior Court of Baltimore City, defendant herein, by Herbert R. O'Conor, Attorney General, and William L. Henderson, Assistant Attorney General, his attorneys, demurs to the petition for writ of mandamus, exhibited against him, and to each and every paragraph thereof, and for reasons thereof says:

1. That the same is bad in substance and insufficient in law;

2. That the petition does not state such a cause of action as to entitle the petitioner to the relief prayed;

[fol. 13] 3. That the petitioner is not performing such a governmental function as to entitle it to immunity from the stamp and recordation tax referred to;

4. That the petitioner is not exercising any function within the powers delegated to the National Government by the Federal Constitution;

5. That the petitioner in making said loan is not exercising a public function;

6. That the petition does not show that the payment of the stamp and recordation tax referred to, imposes any burden upon the petitioner;

7. And for other and further reasons to be shown at the hearing.

Herbert R. O'Conor, Attorney General; Wm. L. Henderson, Asst. Attorney General, Attorneys for Clerk of the Superior Court.

Reasons filed and Issue joined (short) on the Demurrer.

IN BALTIMORE CITY COURT

ORDER OVERRULING DEMURRER

6th May, 1938—Demurrer to the Petition for a Writ of Mandamus "Overruled" with leave to answer within 30 days (Judge Dickerson).

[fol. 14] IN BALTIMORE CITY COURT

SYLLABUS

The legislation under which the Home Owners' Loan Corporation was created is a constitutional exercise of the powers of the National Government.

The corporation is an instrumentality of the Federal Government, and, as such, is subject only to such taxation as shall be permitted by Congress.

The documentary and recording taxes on mortgages, prescribed by Chapter 11, Section 4, Paragraph 213, of the 1937 Special Session of the Maryland Legislature, are an indirect tax upon loans made by the corporation, and are within the prohibition of the Home Owners' Loan Act of 1933, as amended.

MEMORANDUM—Filed May 6, 1938

DICKERSON, J.:

The Home Owners' Loan Corporation has petitioned this Court for a writ of mandamus to compel M. Luther Pittman, Esq., Clerk of the Superior Court of Baltimore City, to receive and record a certain mortgage, a copy of which was filed with the Petition as an exhibit, upon payment of the usual recording fee, but without payment of the recording tax and affixation of the documentary stamps prescribed by Paragraph 213, et seq., Section 4, of Chapter 11 of the Acts of the General Assembly of Maryland, passed at the 1937 Special Session.

The case was heard on demurrer to the Petition and the following questions were raised:

1. Whether the Petitioner is performing a governmental function, so as to entitle it to immunity from the tax complained of.

2. Whether it is exercising any function within the powers delegated to the National Government by the Federal Constitution.

[fol. 15] 3. Whether the tax complained of will impose any burden upon the Petitioner.

The Petitioner avers that it is a corporate instrumentality of the United States, organized, existing and operating in the several States, including Maryland, pursuant to Acts of Congress, and that its entire capital stock is owned by the United States; that in the course of its operations it received, as security for a loan, a certain mortgage, a copy of which was filed as an exhibit, and particularly set forth in the Petition, on certain leasehold property located in Baltimore City; that in order to fully protect its mortgage, it was necessary to have it recorded, and that on March 12, 1938, it tendered the mortgage to the Respondent for recordation, together with the usual recording charges, but that the Respondent refused to receive the mortgage for record, without affixation of the documentary stamps and payment of the recording tax of fifty cents prescribed by the Act of the Maryland Legislature above referred to.

It is further alleged that the documentary stamps and recording tax are in nowise a service charge incident to recording. The Petitioner claims that as an instrumentality of the National Government, it is immune from taxation, except as provided by the Legislation under which it was constituted, and that the attempted collection of the tax complained of is an unlawful interference with and burden upon its operations. It is further alleged that in assisting home owners, in involuntary defaults on loans, it has preserved their homes through refinancing, and that its operations in the State of Maryland aggregated 15,940 in number, and $45,579,933 in amount; that through foreclosures in this State it has acquired 2,000 separate pieces of property and, pursuant to its liquidating program, a great deal of recording will be required, all of which is recited as evidence of the alleged public nature and importance of the questions involved. Finally, it is claimed, that it has no legal remedy other than the one involved in these proceedings. Whether the Petitioner will, in the course of its operations, exact the tax from the borrower or grantee, or

whether having paid the tax, it will pass it on to the borrower or grantee, is not disclosed, but whichever will even-
[fol. 16] tuate, has been held immaterial to the determination of the questions involved. Federal Land Bank vs. Crosland, 261 U. S., 374, 378.

In that case, mandamus proceedings were instituted to compel recordation of a Federal Land Bank mortgage without payment of the prescribed tax. While the case turned principally upon the holder's option to record the mortgage or not, the Supreme Court said:

"It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The Statute says that the lender must pay the tax, but whoever pays it, it is a tax upon the mortgage and that is what is forbidden by the law of the United States."

The tax complained of was imposed by Section 4, Paragraph 213, et seq., of Chapter 11 of the Acts of the Special Session of the Maryland Legislature of 1937, which impose a tax of ten cents for each $100, or fractional part thereof, of the actual consideration paid or to be paid for the property transferred, and in addition, a tax of fifty cents on each such instrument recorded or offered to be recorded, with the exception of certain instruments mentioned in the Statute. This is clearly a tax and not a service charge incident to recording.

Home Owners' Loan Corp. v. Anderson (Ken.) 64 Pac. 2nd, 14, 15.

Arkansas City B. & L. Asso. v. Murray, 127 Kan. 208.

Wheeler v. Weightman, 96 Kan. 50.

In the Anderson case, the Petitioner sought to avoid compliance with a State mortgage registration fee, held to be a tax, and the Court definitely held that the Petitioner was not subject to the imposition of the tax, and said:

"There can be little doubt that as operated at the present time, the Home Owners' Loan Corporation is an instrumentality of the Federal Government comparable to the United States Bank dealt with in McCulloch v. State of Maryland, 4 Wheaton, 316, 4 L. Ed. 579. The United State-
[fol. 17] Supreme Court has held that such instrumentalities were not required to pay tax on mortgages offered for registration."

Federal Land Bank v. Crosland, supra, page 378, where the Supreme Court said, with reference to a similar document, offered for record by the Federal Land Bank of New Orleans:

"Of course the State is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case, the Legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax * * *. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach."

Smith v. Kansas City Title Co., 255 U. S. 180, 212.

In the recent case of State Tax Commission of Maryland v. Baltimore National Bank and Reconstruction Finance Corporation, Intervenor, Daily Record, May 2, 1938, Judge Offutt, in his opinion, has very definitely described the status of governmental agencies of the character of the Petitioner in the instant case, which so closely approximates the Reconstruction Finance Corporation, in the following language:

"Whatever may be said of the danger that the swift currents of the ever widening whirlpool of Federal activities will carry beyond the taxing power of the States so much property as to threaten the very existence of our dual form of government, it cannot be denied, that the primary and essential duty of the national government in that crisis was to prevent if possible the complete collapse of the nation's credit, irreparable damage to its commerce and industry, and the chaos and disorder which were likely to follow. Nor can it be denied that the Reconstruction Finance Corporation as the agency employed to grant that aid was an essential instrumentality of the national government created and existing to perform governmental function of the highest possible importance. Every reason advanced [fol. 18] by the Courts in support of the immunity of national banks, and the Federal Reserve Bank from State taxation applies with at least equal force to the Finance Corporation. Neither performs a function more immediately

essential to the continuance and integrity of the national government * * *. Nor is there rational support for the theory that the use of the nation's resources to avert a common national disaster is beyond the natural and legitimate scope of the powers granted to the national government 'in order to form a more perfect Union, establish Justice, insure domestic Tranquil-ity, provide for the common defence, promote the general welfare.'"

There is greater reason for holding the Petitioner in the instant case a governmental instrumentality than in the case just referred to. Its operations are confined to the lending of money on homes, in order to extricate home owners from otherwise insoluble financial difficulties, in connection with loans on their homes; its stock is owned entirely by the United States, which guarantees the payment of principal and interest of its securities, and its funds are under the control of the National Treasury. To hold unconstitutional the legislation under which the Home Owners' Loan Corporation was constituted, would require clear evidence of conflict with the constitution. A situation which presents only reasonable doubt will not justify a conclusion of unconstitutionality.

Legal Tender Cases, 12 Wallace, 531.

It is provided in Article 6 of the Constitution that the Constitution and all legislation in pursuance of, and all treaties made under its authority, shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.

By Section 8 of Article 1, authority is conferred on the National Government to make all laws which may be necessary and proper for carrying into execution the powers conferred by the Constitution upon the National Government, and all other powers vested in the National Government, or any department thereof, by the Constitution.

In the great case of McCulloch v. Maryland, 4 Wheaton, 316, 421, 436, Chief Justice Marshall said:

[fol. 19] "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

"* * * the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is * * * the unavoidable consequence of that supremacy which the Constitution has declared."

Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 212.

Osborn v. Bank of U. S., 9 Wheaton, 738, 859.

In the earlier case of State Tax Commission v. Baltimore National Bank, 169 Md. 65, stock held by the Reconstruction Finance Corporation in the Baltimore National Bank was held taxable because Congress had not at that time withdrawn from the States permission to tax shares of stock in national banks, and on this ground alone, the Supreme Court of the United States affirmed the decision of the Court of Appeals of Maryland.

297 U. S. 209.

The permission to tax stock in national banks was withdrawn by the Act of Congress of March 20, 1936, referred to by Chief Judge Bond in his concurring opinion in the recent case of State Tax Commission vs. Baltimore National Bank, et al., supra, and on the ground that the authority to tax had been withdrawn, the Court of Appeals of Maryland held in that case that the stock of the Baltimore National Bank, owned by the Reconstruction Finance Corporation, was not subject to taxation.

Chief Judge Bond said:

"It is taken as settled that stock in national banks may be taxed only by consent of the United States Congress. People v. Weaver, 100 U. S. 539, 543; Talbot v. Silver Bow County, 139 U. S. 438, 440; Davis v. Elmira Savings Bank, [fol. 20] 161 U. S. 275, 283; Tax Commission v. Baltimore National Bank, 169 Md. 68."

He further said:

"A broad question whether the powers with which the Finance Corporation was invested by the terms of the Act under which it was formed * * * could constitutionally be exercised at all by the Federal Government, was raised on the former appeal, and in the Supreme Court appears to have been taken as beyond dispute."

By express provisions of the Home Owners' Loan Act of 1933, as amended, its franchise, capital, reserves, surplus, its loans and income, were declared exempt from State taxation, while permission was given to tax its real estate. While the term "mortgage" is not used in the exemption, a registration tax was held to be an indirect tax upon the mortgage in the case of Home Owners' Loan Corporation v. Anderson, supra, and it is a fair construction of the Statute that Congress meant not only to exempt the loan, but all of its incidents, including the documents by which it should be evidenced.

In Federal Loan Bank v. Crosland, supra, and Federal Loan Bank v. Hubbard, 163 Va. 860, it was held that the States have no power to tax mortgages or other instruments of writing, evidencing loans made in connection with the operation of Federal Land Banks, and while these cases, as well as the State Tax Commission v. Baltimore National Bank, et al., supra, relate to other governmental instrumentalities, the analogy between them and the instant case is so close that they definitely indicate the immunity of the Petitioner in the instant case from liability for the tax complained of.

In People v. Graves, 57 Supreme Court, 269, 272, the General Counsel of the Panama Railroad Company, a governmental instrumentality, was held not to be subject to an income tax prescribed by the State of New York. In that case, the Supreme Court very broadly stated:

"The power of the Federal Government to use a corporation as a means to carry into effect the substantive powers granted by the Constitution has never been doubted since McCulloch vs. Maryland, 4 Wheaton, 316. * * * The [fol. 21] Panama Railroad Company was acquired and has been utilized in virtue of that power. The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."

In South Carolina v. United States, 199 U. S. 437, 463, it was held that when a State engages in proprietary functions, its property so used may be subjected to Federal taxation, and this declaration was affirmed in Helvering v. Therrell, 58 S. Ct. 539, 542, and in Heldering v. Powers, 293 U. S. 214, 225-6, but the converse of this proposition is not

true, because when once the concession is made that the instrumentality is governmental in character, its property, funds and franchises are only subject to such State taxation as the National Government shall permit.

McCulloch v. Maryland, supra, p. 435-6.

Jaybird Mining Company v. Weir, 271 U. S. 609, 613, where the Court said:

"It is elementary that the Federal government in all its activities is independent of State control. This rule is broadly applied. And without congressional consent, no Federal agency or instrumentality can be taxed by State authority. 'With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since McCulloch v. Maryland, 4 Wheat., 316.' "

Graves v. Texas, 298 U. S. 393, 401.

The fact that the tax involved in the instant case amounts to the trifling sum of seventy cents in no way affects the immunity claimed.

Indian Motorcycle Co. v. U. S., 283 U. S. 570, 575, where the Court said:

"Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute."

[fol. 22] The language of Chief Justice Marshall in McCulloch vs. Maryland, supra, p. 429, is most pertinent in this connection:

"All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation * * *"

In the case of Smith v. Kansas City Title & Trust Co., supra, pp. 211-12, while the Supreme Court was dealing with a Federal Land Bank, it said very broadly:

"Deciding, as we do, that these institutions have been created by Congress within the exercise of its legitimate authority, we think the power to make the securities here involved tax exempt necessarily follows."

If the doctrine announced in South Carolina vs. U. S., supra, were of reciprocal application, the contention of the Respondent that the tax could be lawfully imposed, would be unanswerable, but that contention ignores the supremacy of national legislation under the Constitution, and is fully answered by the recent decision of our Court of Appeals in State Tax Commission vs. Baltimore National Bank, et al., supra.

I conclude that the Home Owners' Loan Corporation has been constitutionally created under the implied powers of the National Government; that it is an instrumentality of that government, and that is is subject only to such State taxation as the statutes creating it permit; that the documentary and recording taxes complained of, though indirect, are nevertheless, taxes sought to be imposed upon loans of the Petitioner, and within the Congressional prohibition, and that the Petitioner is immune from the imposition of those taxes.

The demurrer to the Petition will, therefore, be overruled.

[fol. 23] IN BALTIMORE CITY COURT

ORDER GRANTING WRIT OF MANDAMUS—Filed June 10, 1938

The Demurrer to the Petition, filed in these proceedings, for the issuance of a Writ of Mandamus as prayed in said Petition, having been, upon hearing held in open court, overruled by order of this Court of May 6th, 1938, with leave to the Defendant to file an Answer to the said Petition within 30 days; the said time allowed having elapsed and the Defendant having failed to file an answer; the matters and facts alleged in the said Petition having been taken as true for the purposes of the said hearing on said Demurrer, it is this 10th day of June, 1938, Ordered by the Baltimore City Court that a Writ of Mandamus be issued by the Clerk of this Court directed to M. Luther Pittman, Clerk of the Superior Court of Baltimore City, commanding him to receive and record a mortgage from Martin J. Burns, and Mary Burns, his wife, to the Home Owners' Loan Corporation dated March 11th, 1938, upon the payment of the ordinary statutory recording charge of $2.50 and without the requirement of the affixation of the State of Maryland Documentary

Stamps for the State recordation tax of fifty cents, and it is further ordered that the Defendant pay the costs.

Edwin T. Dickerson.

ENTRY OF APPEAL

Appeal to the Court of Appeals of Maryland on behalf of the Defendant filed the 15th day of June, 1938: Mr. Clerk:

Please enter an appeal to the Court of Appeals of Maryland, in the above entitled case, from the Order of Court passed on June 10th, 1938.

Herbert R. O'Conor, Attorney General; Wm. L. Henderson, Assistant Attorney General, Attorneys for Clerk of the Superior Court.

[fol. 24] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 25] IN COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1938

No. 64

M. LUTHER PITTMAN, Clerk of the Superior Court of Baltimore City,

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C., a Corporate Instrumentality of the United States of America

DOCKET ENTRIES

Appeal from the Baltimore City Court. Filed August 12, 1938.

December 1, 1938. Order affirmed with costs. Opinion filed. Op.—Urner, J. (Parke and Sloan, JJ., dissent).

December 30, 1938. Motion by appellant to Stay Mandate filed and Order by the Court staying Mandate.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 26] IN COURT OF APPEALS OF MARYLAND, OCTOBER TERM, 1938

No. 64

M. LUTHER PITTMAN, Clerk of the Superior Court of Baltimore City,

vs.

HOME OWNERS' LOAN CORPORATION OF WASHINGTON, D. C., a Corporate instrumentality of the United States of America

OPINION—Filed December 1st, 1938

Judge Urner delivered the Opinion of the Court

Parke and Sloan, J. J. dissent

[fol. 27] In 1937, the General Assembly, by Chapter 11 of the Acts of its Special Session of that year, added to Article 81 of the Code, entitled "Revenue and Taxes", two sections, 213 and 214, under the sub-title "Tax on the Recordation of Instruments in Writing". Section 213 provides:

"A tax is hereby imposed upon every instrument of writing recorded or offered for record with the Clerks of the Circuit Courts of the respective Counties, or the Clerk of the Superior Court of Baltimore City, on and after June 1, 1937, to and including September 30th, 1939, including mechanics liens, deeds, mortgages (except purchase money mortgages), chattel mortgages, bills of sale, conditional contracts of sale, leases, confessed judgments, magistrates' judgments, crop liens, deeds of trust, and any and all other instruments of writing, so recorded or offered for record, which create liens or incumbrances on real or personal property; or convey title to real or personal property; provided, however, that said tax shall not apply to assignments of mortgages; purchase money mortgages, absolute or partial releases, or orders of satisfaction."

"The tax hereby imposed shall be at the rate of 10¢ for each $100, or fractional part thereof, of the actual consideration paid or to be paid, for the property transferred, in the case of instruments conveying title, and at the rate of 10¢ for each $100, or fractional part thereof, of the principal

amount of the debt secured, in the case of instruments securing a debt, or reserving title as security for a debt."

"In addition to the tax hereby imposed, the Clerks shall collect a charge of 50¢ for each such instrument recorded or offered for record."

Included in Section 214 are these provisions: "No such instrument shall be received for record by any Clerk of the Court unless and until a stamp is affixed to said instrument and canceled. * * * It shall be unlawful for any person to record any written instrument referred to in this sub-title without having provided for the payment of the tax and [fol. 28] recordation charge as herein provided, and it shall be unlawful for any person to misrepresent the amount of the actual consideration in any such transaction".

The Act of Congress creating the Home Owners' Loan Corporation, (June 13, 1933, c. 64, §1, 48 Stat. 128; U. S. C. A. Ch. 12, Secs. 1461-1468), contains the following tax exemption clauses: "The bonds issued by the Corporation under this sub-section shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed."

A duly executed mortgage to the Home Owners' Loan Corporation on property in Baltimore City was presented by the Corporation to the Clerk of the Superior Court for the purpose of having it recorded among the land records of the city, but the Clerk refused to receive and record the mortgage because the Corporation declined to pay the recordation tax and charge imposed by the Act of 1937, in addition to the sum of $2.50 specified by the Clerk [fol. 29] as properly payable for recording the instrument. The amount of the recording cost was tendered by the Corporation, but it claimed immunity from the recordation tax charges by virtue of the quoted exemption clause of the Federal statute and because of its character and functions as a governmental agency. The recording of

the mortgage being necessary under the Maryland law for the adequate protection of the mortgagee's interest, the Home Owners' Loan Corporation petitioned the lower Court for the writ of mandamus to compel the Clerk to record the instrument upon payment of the ordinary legal fee for such service. A demurrer by the Clerk to the petition having been overruled, with leave to answer, but that method of defense not having been utilized, the Court ordered that the writ of mandamus sued for be issued. This appeal has resulted.

In our opinion the order below was justified, and its affirmance is required, by the decision of the Supreme Court in the case of Federal Land Bank vs. Crosland, 261 U. S. 374, 67 L. Ed. 103. That decision reversed a decree of the Supreme Court of Alabama which refused to order the recording officer of Montgomery County to record a mortgage on receiving the usual recording fee, but without payment of an additional sum as a recordation tax. In the opinion of the United States Supreme Court, as delivered by Mr. Justice Holmes, the case was stated and discussed, in part, as follows: "The General Revenue Act of the State, approved September 15, 1919, by §361, Schedule 71, (Acts 1919, p. 420) provides that no mortgage [fol. 30] shall be received for record 'unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to wit: * * * upon all instruments which shall be executed to secure an indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one-hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage * * * to be paid for by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender.' Any probate judge who shall receive a mortgage without collecting the 'recording or registration tax,' &c., is made guilty of a misdemeanor and punished."

"On the other hand, the Federal Farm Loan Act of July 17, 1916, c. 245, §26, provides that first mortgages executed to Federal Land Banks shall be deemed 'instrumentalities of the government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation.' 39 Stat. 360, 380. The validity of this provision is not questioned.

Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 207, 212. Of course therefore it must prevail over any inconsistent laws of a State."

"The tax was sustained by the Supreme Court of the State, and the petition for mandamus was ordered to be dismissed on the ground that the payment was optional; that the Federal Land Bank was not required to put its deed on record, and that if it did it must pay whatever [fol. 31] others were required to pay for the registration of its security. But the case is not quite so simple as that. The law of Alabama does make it practically necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so it cannot say that it leaves the Bank free to record or not. The bank has a choice, it is true, but so has one who acts under duress. The Eliza Lines, 199 U. S. 119, 131. * * *"

"Of course, the State is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the Legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. If it attempted to disguise the tax by confounding the two, the Courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce. D. E. Foote & Co. v. Stanley, 232 U. S. 494. But it has made no such attempt. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach. * * * It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax, but, whoever pays it, [fol. 32] it is a tax upon the mortgage and that is what is forbidden by the law of the United States."

It has been argued for the appellant that the Crosland case is distinguishable because of the provisions in the Federal Farm Loan Act requiring payment of the mortgage recording tax by the lender and declaring mortgages held by the Federal Land Bank to be instrumentalities of the United States. Those differences appear to us immaterial. By the

Federal Act with which this case is directly concerned, the Home Owner's Loan Corporation is expressly declared to be "an instrumentality of the United States", and the mortgages securing its loans are acquired by it in that capacity. Consequently we are unable to differentiate them from mortgages of the Federal Land Bank with respect to such a question as we have now under consideration. The provision for the payment of the tax by the lender was regarded in the Crosland case as having no determining significance.

It was further argued, in effect, that the case of Federal Land Bank v. Crosland, if not distinguishable from the present case, may be disregarded as a precedent because of the trend of later decisions of the Supreme Court, which are said to be at variance with the theory on which that case was determined. The cases cited to support this theory are James V. Dravo Contracting Co., — U. S. —, 82 L. Ed. 125 (Adv. Sheets); Silas Mason Co. v. State Tax Commission of Washington, — U. S. —, 82 L. Ed. 154 (Adv. Sheets); Atkinson v. State Tax Commission of Oregon, — U. S. —, 82 [fol. 33] L. Ed. 440 (Adv. Sheets); Helvering v. Gerhart, — U. S. —, 82 L. Ed. 962 (Adv. Sheets); Allen v. Regents of University System of Georgia, — U. S. —, 82 L. Ed. 975, (Adv. Sheets); and Helvering v. Mountain Producers Corporation, — U. S. —, 82 L. Ed. 607 (Adv. Sheets). In the first three of those cases the Supreme Court was considering questions as to the liability to State income taxes of earnings by contractors in the performance of work for the Federal Government. Each of the other three cases involved the claim of a State agency, or its employees, or the lessee of State property, to immunity from Federal income taxes. None of the opinions in those cases made any qualifying reference to the Crosland case. As the decision in that case was concerned with a question closely analogous to the one here raised, and as it has not been overruled, we may not disregard it upon the theory that it is inconsistent with adjudications of other questions in the later cases which have been cited. The Crosland decision affords an authoritative precedent, and a sufficient ground, for the determination of this case, and hence there is no occasion to analyze in this opinion the principles and limitations of intergovernmental immunity which affect the solution of such a problem as this case has presented.

Order affirmed, with costs.

[fol. 34] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 43,187. Maryland, Court of Appeals. Term No. 702. M. Luther Pittman, Clerk of the Superior Court of Baltimore City, petitioner, vs. Home Owners' Loan Corporation of Washington, D. C. Petition for a writ of certiorari and exhibit thereto. Filed February 25, 1939. Term No. 702, O. T. 1938.

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 17, 1939

The petition herein for a writ of certiorari to the Court of Appeals of the State of Maryland is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.